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M E M O R A N D U M

TO: **Honorable Hopkinton Planning Board**

FROM: **Peter F. Skwirz, Esq.**

DATE: **October 29, 2020**

SUBJECT: **Stone Ridge solar project on Plat 11, Lot 47A**

I. Introduction -

This memorandum is presented to provide a brief analysis of the legal issue presented at the October 7, 2020, Planning Board meeting on the Stone Ridge solar project, regarding whether a solar development is a permitted use for the Commercial Special zone on that parcel. It is the opinion of this office, as discussed below, that it is not an allowed use, as the permitted uses were expressly limited when the parcel was rezoned from Residential to Commercial Special.

II. Analysis –

As the Board is aware, a Commercial Special zone is not the same as an ordinary Commercial zone. Instead, a Commercial Special zone is a Commercial zone with restrictions. The Town Council rezoned this large parcel in 1990 from Residential to Commercial Special in order to accommodate the Brae Bern project. When it did so, it imposed conditions on the rezone. To find out what those restrictions are, the first place to look is the minutes from the Council

meeting when the parcel was rezoned. Accordingly, attached for your review as **Exhibit A** are the July 2, 1990 minutes of the Council meeting where the Property was rezoned.

On page 252 of the minutes, paragraph 11 plainly states that application to rezone "is granted subject to the following restrictions." Subsection (b) of paragraph 11 then lists the use restrictions on the rezone, which reads as follows:

> "**The maximum number of structures and the uses in this zone permitted in connection with this project shall be as proposed: i. one hotel and one conference center having a combined total of 200 rooms; ii. One country club; iii. 165 units of residential housing; iv. One 18-hole golf course.**"

Determining whether a solar project is an allowed use consistent with this restriction is a simple task. The restriction lists the maximum number of uses and structures allowed. Solar is not on the list. Therefore, solar is not allowed.

If the terms of this restriction were not clear enough already, the minutes from the Planning Board meeting that brought about this restriction make absolutely clear that it was intended to eliminate the potential for any other commercial use on this parcel. Attached as **Exhibit B** are the minutes from the March 14, 1990, Planning Board meeting, where the Board considered giving a recommendation to the Council on the Brae Bern zone change. In those minutes, Brae Bern's attorney, Vincent Naccarato, makes the following representation to the Board: "**Mr. Naccarato stated that they are seeking to permit specific uses allowed in a specific ordinance for a particular ordinance. There is not intention of picking up additional permitted commercial uses.**" (Emphasis added). As a result of this statement from Mr. Naccarato, the Planning Board, at its April 25, 1990, meeting, made a recommendation to the Council on the zone change. The minutes of that meeting, attached as **Exhibit C**, notes the following: "**Please note that the applicant has agreed to revise the application as follows: 1. That under application item #16, the permitted commercial uses 1-15 be deleted.**" Based on Planning Board concerns that other

commercial uses could creep onto this property once rezoned, Brae Bern amended its application so that it was explicitly not asking for any other commercial uses on the property, but, instead, limiting its request for rezone to its specific proposed use. In response, the Council passed restriction 11(b), limiting the rezone to the specific use proposed by Brae Bern. That restriction stated in 11(b) should be enforced.

In his memorandum to the Board, the Solicitor suggests that this restriction should not apply in this case, because, in his opinion, it should be read as limited to only the Brae Bern project. In the Solicitor's opinion, this restriction cannot provide any restriction on the use of the property by future applicants other than Brae Bern. With all due respect, however, the Solicitor's opinion violates a basic principle of zoning. In a recent case involving the Hopkinton Zoning Board, the Rhode Island Supreme Court opined that "**a zoning authority is not free to impose [an occupant specific] condition on the use of land. It is well settled that the law of zoning governs the use of the land itself, not those who occupy it.**" See Preston v. Zoning Board of Hopkinton, 154 A.3d 465 (R.I. 2017). The Solicitor's interpretation of restriction 11(b) would require this Board to interpret that condition as an illegal occupant specific condition, which this Board should not do. Instead, the restriction stated in paragraph 11(b) runs with the land and restricts all owners and occupants of the land equally.

The only other argument to counter the plain language stated in restriction 11(b) is that previous zoning certificates were issued by prior building officials saying that the restriction doesn't apply. But, the opinion of the building official is not the law. The language of restriction 11(b) is the law and it must be followed. The developer of Stone Ridge cannot rely on a prior building official's mistaken opinion to say the law doesn't apply to it. The Rhode Island Supreme Court has repeatedly held that a property owner's "**failure to comply with the zoning ordinance**

is neither mitigated nor excused by the mere fact that the town building official also erred." See Martel Inv. Group, LLC v. Town of Richmond, 982 A.2d 595 (R.I. 2009).

Here, the requirements of the law are clear. The Town Council rezoned a large residentially zoned parcel, which is surrounded by other residential parcels, and restricted the rezone to specific uses that don't include solar. Therefore, the restriction must be applied and solar is not allowed on this parcel. Failure to abide by this restriction could set a precedent with serious consequences for the Town. In recent years, the Town Council has rezoned a number of residentially zoned parcels to Commercial Special, with the allowed use on the rezoned parcel restricted to solar development. The neighboring residents have relied on the representations by the Council that these restrictions would be enforced, and that the property could not change hands to allow some other, unanticipated commercial use in the future. If the Planning Board accepts the opinion of the Solicitor with regard to the use restrictions in this Commercial Special zone, it could prevent the enforcement of the use restrictions on all of the recently rezoned parcels.

However, as the Assistant Solicitor opined at the October 7 Planning Board meeting, the Board is not required to accept to opinion of the Solicitor on this question. Instead, in reviewing this application, the Planning Board must make an independent determination that "the proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance." See RIGL 45-23-60(2). Because this Commercial Special zone does not allow a solar use, this project is not in compliance with the Hopkinton Zoning Ordinance and the master plan approval should be denied.